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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 0 1 2010

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a molecular diagnostic research and development business and seeks to employ the beneficiary permanently in the United States as an associate director of development, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner asserts that the beneficiary qualifies for Schedule A, Group II designation.

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file a Form I-140 petition, "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the DOL's Labor Market Information Pilot Program."[1] The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [U.S. Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer's completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d).

On January 20, 2009, the director denied the petition because the petitioner failed to post the position properly and because the petitioner failed to post the position as part of its in-house media in accordance with 20 C.F.R. § 656.10(d)(1).

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

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[1] On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of*

The record shows that the appeal is properly filed, timely, and makes an allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

One of the requirements to meet Schedule A eligibility is that the petitioner post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

> (1) In applications filed under § 656.15 (Schedule A), § 656.16 (Sheepherders), § 656.17 (Basic Process); § 656.18 (College and University Teachers), and § 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:
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> . . .
>
> (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment . . . In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization.
>
> . . .
>
> (3) The notice of the filing of an Application for Permanent Employment Certification shall:
>
> (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;

Soriano, 19 I&N Dec. 764 (BIA 1988).

(ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
(iii) Provide the address of the appropriate Certifying Officer; and
(iv) Be provided between 30 and 180 days before filing the application.

. . .

(6) If an application is filed under the Schedule A procedures at § 656.15. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, section 212 (a)(5)(A)(i) of the Act states the following:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified . . . that
>
> (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

Fundamental to these provisions is the need to ensure that there are no qualified U.S. workers available for the position prior to filing. The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing. *See* the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

The posting notice accompanying the Form I-140 petition is dated April 13, 2007 to April 25, 2007. It was completed more than 30 days prior to filing, but it was not posted for 10 or more consecutive business days. Rather, it was posted for nine consecutive business days. The AAO notes that the petitioner asserted in its appeal that the notice was posted from April 13, 2007 to April 26, 2007, a total of 10 consecutive business days. The AAO has reviewed the posting notice and finds that the document clearly stated that it was posted until April 25, 2007, not until April 26, 2007. The AAO finds that the petitioner did not make proper notice in accordance with 20 C.F.R. § 656.10(d). Accordingly, the petitioner has failed to meet the regulatory requirements, which require that the posting notice be completed prior to filing the Schedule A application.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner asserts that the beneficiary qualifies for Schedule A, Group II designation. The director did not contest that the beneficiary is eligible for classification as an alien of exceptional ability or a member of the professions holding an advanced degree. Rather, the director concluded that the petitioner had not demonstrated that the beneficiary qualifies for Schedule A, Group II designation. For the reasons discussed below, we concur with the director that the beneficiary's publication record, including the frequent and widespread citation of his work, serves to meet one of the regulatory criteria, but that the petitioner has not provided sufficient evidence to establish that the beneficiary meets any of the other regulatory criteria.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at C.F.R. § 204.5(k)(4) provides the following information regarding labor certification and Schedule A designation:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

The ETA Form 9089 indicates that a doctorate degree is required for the position. The beneficiary holds a [redacted] The beneficiary's occupation falls within the pertinent regulatory definition of a profession. The beneficiary thus qualifies as a member of the professions holding an advanced degree and the position itself requires an advanced

degree professional. The remaining issue is whether the petitioner has established that the beneficiary qualifies for Schedule A designation.

In order to establish eligibility for Schedule A designation, the petitioner must establish that the beneficiary qualifies as an alien with exceptional ability *as defined by the Department of Labor.* 20 C.F.R. § 656.15(d). This petition seeks to classify the beneficiary as an alien with exceptional ability in the sciences. 20 C.F.R. § 656.15(d)(1) provides, in pertinent part:

> An employer seeking labor certification on behalf of an alien to be employed as an alien of exceptional ability in the sciences or arts (excluding those in the performing arts) must file documentary evidence showing the *widespread acclaim and international recognition* accorded the alien by recognized experts in the alien's field; and documentation showing the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability.

(Emphasis added.) In addition, the same provision outlines seven criteria, at least two of which must be satisfied for an alien to establish the widespread acclaim and international recognition necessary to qualify as an alien of exceptional ability. Given the introductory language to the criteria emphasized above in 20 C.F.R. § 656.15(d)(1), the evidence submitted to meet these criteria should be indicative of or uniquely consistent with "widespread acclaim and international recognition" as a scientist of exceptional ability if that regulatory standard is to have any meaning. The petitioner has submitted evidence that is claimed to meet the following criteria.

Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought.

Throughout the proceeding, including on appeal, counsel has asserted that research grants from the [redacted] can serve to meet this criterion. The petitioner submitted evidence that [redacted], the beneficiary's prior employer, received NIH grants for projects on which the beneficiary was the principal investigator.

The director concluded:

> Every successful scientist engaged in research, of which there are hundreds of thousands, receives funding from somewhere. Obviously the past achievements of the principal investigator are a factor in grant proposals. The funding institution has to be assured that the investigator is capable of performing the proposed research. Nevertheless, a research grant is principally designed to fund future research, and not to honor or recognize past achievement.

Counsel has asserted that the director erred in reaching this conclusion but has provided no discussion of how these statements are factually, logically or legally wrong. The director's conclusion is clearly factually sound; the petitioner relies solely on the beneficiary's research grants designed to fund future research. Further, we find no flaw in the director's logic or reasoning; a research grant designed to fund future research is not designed to recognize past excellence. Finally, the director's interpretation of the plain language of the regulation as requiring awards or prizes designed to recognize past excellence is reasonable and we know of no legal authority presenting a contrary position. Thus, we concur with the director's conclusion and reasoning; research grants are not awards or prizes for excellence in the field.

> *Published material in professional publications about the alien, about the alien's work in the field for which certification is sought, which shall include the title, date, and author of such published material.*

The petitioner has submitted evidence that the beneficiary is well cited. The director analyzed these citations and concluded that the petitioner had not demonstrated that the beneficiary had been cited "as authoritative." Counsel has asserted that the director's analysis was in error.

Articles which cite the beneficiary's work are primarily about the author's own work, not the beneficiary or his work. As such, citing articles, which typically cite at least tens of articles, cannot be considered published material about the beneficiary or his work. We do not contest that the beneficiary's citation record is valuable evidence which will be considered below in evaluating whether the beneficiary's publication record is consistent with widespread acclaim and international recognition. Citations, however, cannot be credibly considered articles about the beneficiary or his work and, thus, cannot serve to meet the plain language of this criterion.

> *Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought.*

Counsel has asserted throughout the proceeding that the beneficiary's position as principal investigator for funded research projects serves to meet this criterion. The director concluded that the beneficiary's supervisory duties were inherent to his occupation and did not involve judging on a national or international scale. Once again, while counsel asserts that the director's conclusions are erroneous, counsel has provided no discussion or legal analysis supporting his assertion.

It is significant that the regulation is not worded to require evidence that the alien has judged the work of others. Rather, the plain language of the regulation requires evidence of the alien's participation on a panel or individually as "a judge." The requirement that the alien have participated as "a judge" implies participation in an official judging position. A supervisor, while responsible for overseeing the work of his subordinates, is not participating as "a judge" of those subordinates. Moreover, the mere act of leading a research team is not indicative of or uniquely consistent with widespread acclaim and international recognition as a scientist of exceptional ability.

We concur with the director that the record lacks evidence that the beneficiary has participated as "a judge" of the work of others. Without evidence that the beneficiary has served in an official judging

position indicative of widespread acclaim and international recognition as a scientist of exceptional ability, such as but not limited to, as a judge of work under consideration for a recognized award, on an editorial board or as a grant reviewer, we cannot conclude that the beneficiary meets this criterion.

Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought.

According to the regulation at 20 C.F.R. § 656.15(d)(1)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous. To be considered a contribution of major significance in the field of science, it can be expected that the results would have already been reproduced and confirmed by other experts and applied in their work. Otherwise, it is difficult to gauge the impact of the beneficiary's work.

Initially, counsel asserted that the patent application, reference letters and six citations submitted with the petition establish the beneficiary's eligibility under this criterion. Noting that the reference letters were from the beneficiary's immediate circle of colleagues and that some of the letters were dated several years prior to the filing date of the petition, the director requested new reference letters that "clearly indicate the impact the beneficiary's research has had on his field." In response, the petitioner submitted two new letters. One of the new letters focuses on the importance of the beneficiary's *area* of research and the other is from a former close colleague. Counsel subsequently asserted that the director erred in "dismissing letters of support describing original contributions of the beneficiary because the letters were either written several years ago, not dated, or written by 'the beneficiary's supervisor,'" but did not elaborate further.

Regarding the patent application, this office has previously stated, in a precedent decision involving a lesser classification, that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 n. 7, (Comm. 1998). Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* Thus, a patent application cannot, by itself, serve as evidence of a contribution of major significance. The record does not indicate, for example, that there has been widespread interest in licensing the beneficiary's patent-pending innovation.

We acknowledge that the beneficiary has been widely cited. This evidence, as discussed below, reflects on the beneficiary's publication record and is a significant consideration in our conclusion that the beneficiary meets the scholarly articles criterion set forth at 20 C.F.R. § 656.15(d)(1)(vi), discussed below. Such evidence could also serve to support reference letters that address the beneficiary's contributions of major significance. For the reasons discussed below, however, we concur with the director that the reference letters in this matter are insufficient.

At the outset, we note that USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the

petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

In evaluating the reference letters, we note that letters containing general, poorly supported assertions of widespread acclaim, discussions of the importance of the *area* of the beneficiary's work or vague claims of contributions are less persuasive than letters that specifically support the beneficiary's purported widespread acclaim and international recognition as exceptional, such as by identifying contributions and providing specific examples of how those contributions have influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are the most persuasive as they are consistent with widespread acclaim and international recognition. Overall, the letters in the record do not provide information consistent with widespread acclaim and international recognition; for example, as discussed below in more detail, they do not provide specific examples of how the beneficiary's work is already being applied in the field and none of the letters are from independent references actually applying the beneficiary's work or who have been influenced by the beneficiary. In fact, the petitioner has not submitted any letters from independent experts in the field.

[redacted], the petitioner's [redacted] and founder, discusses his recruitment of the beneficiary to Ambion, Inc. and then to the petitioner. [redacted] asserts that, prior to joining Ambion, the beneficiary had "extensive and impressive research experience of fundamental and applied RNA, studies on the regulation of the pre-mRNA splicing machinery, numerous scientific publications, and research of P-element transposase pre-mRNA splicing." At Ambion, the beneficiary "developed and launched a number of products related to [redacted] microassays." The beneficiary also led the development of Ambion's *in vitro* transcription technology, using this technology in a series of contract research and manufacturing products with a large pharmaceutical company. While [redacted] asserts that the beneficiary's level of productivity was exceptional, he does not explain the significance of any of the beneficiary's products or discuss their success or use beyond Ambion other than to assert that the beneficiary also worked with a large pharmaceutical company. The record contains no confirmation of the beneficiary's work with a large pharmaceutical company.

[redacted] provides similar information, also asserting that "several" of the beneficiary's products were "a strong commercial success for Ambion." [redacted] further asserts that the new system for synthesizing capped RNA he developed with the beneficiary is five times more efficient and that capped RNA "is being used in the manufacture of cancer vaccines by companies such as [redacted] Thus, [redacted] concludes that the beneficiary's work has "important implications for human health." [redacted] does not assert that [redacted] or any other company has already adopted the beneficiary's system for synthesizing capped RNA or is considering doing so. The record contains no letters from researchers at Wyeth or other cancer vaccine manufacturers asserting that they have adopted the beneficiary's system for synthesizing capped RNA.

The petitioner also submitted evidence regarding his Ph.D. research. [redacted] the beneficiary's Ph.D. research advisor at the [redacted] asserts that the beneficiary's Ph.D. research produced significant and novel findings. While [redacted] notes that this work was published, he provides no examples of how this work has influenced the field through application in other laboratories. The petitioner also submitted a 1998 report on the beneficiary's thesis rating it as "exceptionelle." Finally, the petitioner submitted a 1999 letter from [redacted] Director of the [redacted] asserting that the beneficiary's thesis committee, of which [redacted] was a member, gave the beneficiary the highest grade. [redacted] characterizes the beneficiary as "a scientist with a strong potential" and predicts that the beneficiary "will" make a personal imprint on science.

The petitioner later submitted two new letters, one from a former consultant for Ambion and current consultant for the petitioner, [redacted] and the other from a member of the department in which the beneficiary did his postdoctoral work at the [redacted] discusses the importance of miRNA molecules and asserts that the beneficiary is good at gathering data on miRNAs, but fails to identify specific contributions and explain how they have influenced the field. [redacted] asserts that at [redacted] the beneficiary "provided key insights into the mechanisms by which KH domain-containing proteins, such as the P-[redacted] protein and its human orthologues, regulate the processing of specific target transcripts and modulate underlying developmental programs in a tissue specific manner." Dr. [redacted] does not provide examples of how this work is being applied in the field.

The beneficiary's field, like most science, is research-driven, and there would be little point in publishing research that did not add to the general pool of knowledge in the field. All of the letters are from the beneficiary's immediate circle of colleagues. While such letters are useful in explaining the beneficiary's role on a specific project, they cannot, by themselves, establish that the beneficiary enjoys widespread and international recognition as a scientist of exceptional ability. While the record includes numerous attestations of the important of the *area* of the beneficiary's work, none of the references provide examples of how the beneficiary's work is already influencing the field other than a vague assertion that the beneficiary's products have been commercially successful. The letters provide no other *specific* information consistent with widespread acclaim and international recognition. While the evidence demonstrates that the beneficiary is a talented researcher with potential, it falls short of establishing that he had, at the time of filing, already made contributions of major significance consistent with widespread acclaim and international recognition as a scientist of exceptional ability. Thus, the petitioner has not established that the beneficiary meets this criterion.

Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation.

The record contains evidence that the beneficiary has authored several articles and is widely and frequently cited. Thus, we concur with the director's conclusion that the beneficiary meets this criterion.

The documentation submitted in support of a claim of Schedule A exceptional ability must clearly demonstrate that the alien has achieved widespread acclaim and international recognition. The petitioner has shown that the beneficiary is a talented medical researcher, who has won the respect of his collaborators, employers, and mentors. The record, however, stops short of documenting the beneficiary's widespread acclaim and international recognition for exceptional ability in the sciences. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.